

IN THE HIGH COURT OF BOMBAY AT GOA, PANAJI-GOA.

FIRST APPEAL NO.203 OF 2000

Smt. Hirabai Prabhakar Kamat,
Widow of late Prabhakar N. Kamat,
Major of age, Resident of H.No. 5,
Colomb, Rivona, Sanguem.

.... Appellant

Versus

Shri Vallabhdas Vishnudas Sinai Kunkolienkar,
Major, B-9, Mahanagar, Madel,
Behind Dr. Rebello's Hospital,
Margao, Goa.

.... Respondent

Shri S.D. Lotlikar, Sr. Advocate with Shri R. Menezes, Advocate for the
Appellant.

Shri C.A. Coutinho, Advocate for the Respondent.

CORAM : P.V. KAKADE, J.

Date of reserving the judgment :
24/08/2006

Date of pronouncing the judgment :
10/10/2006

JUDGMENT :

The unsuccessful plaintiff in a suit for recovery of money has preferred this appeal against the order of dismissal of suit passed by Additional Civil Judge, Senior Division Margao.

2. I heard the learned Counsel for both the parties. Perused the record.

3. The facts giving rise to the dispute in brief are thus;

The plaintiff is a lady whose family comes from Rivona Village and she resides in ancestral house. Defendant's family is from Deulomla, Shirvoi, Quepem. The families knew each other quite well. In February, 1996, the defendant is said to have requested the plaintiff to give him an amount of Rs. 1,12,557/- as he has to make some payment to the Bank and defendant pleaded for the said loan amount urgently. He agreed to pay interest at the rate of 12% p.a. Plaintiff issued cheque dated 22/02/1996 for Rs. 1,12,557/- bearing no. 135012 drawn on Goa Urban Co-operative Bank Ltd. in favour of the defendant through the plaintiff's saving bank account no. 5419. The said cheque was collected by the defendant from Margao when the plaintiff was residing with her son at Comba. The defendant presented the cheque for repayment of his loan taken by him being term loan account no. 431 with Punjab National Bank, Panjim. Till 1996, plaintiff was residing at Comba, Margao at her son Mahesh's house. In March 1996, some differences arose and she shifted back to ancestors house. She called upon the defendant to make repayment but there was no

response. Hence, legal notice came to be filed and finally suit came to be filed for recovery of amount.

4. The defendant has contested the suit, inter alia, denying the allegations made by the plaintiff stating that no transaction had taken place between plaintiff and defendant. In other words, the defendant had stated that there is no privity of contract between plaintiff and defendant. The defendant has also contended that plaintiff's son was in good terms with him and was also surety for the loan raised by him. According to the defendant he collected amount of Rs. 1,12,557/- and gave it to plaintiff's son to deposit in the Bank and accordingly, the loan account was closed and that further, the plaintiff is taking disadvantage of the fact that cheque was disbursed from her account. Hence, false suit is filed and hence, the suit was sought to be dismissed with costs.

5. The learned trial Judge adjudicated the dispute on merits on the basis of evidence laid by the parties and came to the conclusion that the plaintiff had failed to prove that she had given loan of Rs. 1,12,557/- to the defendant and had also failed to prove the consequential aspect that she was entitle to the interest at the rate of 12% p.a., dismissing the suit, and

hence the appeal.

6. Perusal of the judgment of the trial Court leaves no doubt whatsoever that the evidence laid by the plaintiff as well as by the defendant is not only appreciated in erroneous manner but the basic principles of law are ignored. It is needless to mention that once the fact that plaintiff had issued cheque dated 22/02/1996 for Rs. 1,12,557/- bearing no. 135012, drawn on Goa Urban Co-operative Bank Ltd., in favour of the defendant is proved, primary element of privity of contract between the parties is established. Once it is so established then it would be for the defendant to prove his allegations that there was no privity of contract between the parties but the transaction was in fact different in nature as contended by him in the course of his pleadings, in which task, it is seen, he has utterly failed.

7. Perusal of defendant's oral evidence shows that he has testified to the fact that when the Bank insisted on repayment of the loan he arranged amount and gave it to Mahesh, son of plaintiff to clear the loan account. The amount which was given to him was allegedly equal to the amount under the cheque issued by the plaintiff. It is further the case of the

defendant that he learnt the cash given by him was deposited by Mahesh in his mother's account and then gave the cheque signed by the mother-plaintiff to Punjab National Bank and cleared the loan. In order to explain as to how the money was raised, the defendant has stated that he had a fiat car but he sold it for Rs. 40,000/-. It was sold to his brother-in-law. He has further stated that he has borrowed the amount from brother-in-law and cleared the loan. According to him, his father gave amount of Rs. 60,000/- for the purpose of satisfaction of the loan and remaining amount of Rs. 12,000/- was paid from his personal savings. In spite of this deposition, the defendant has totally failed to prove that he raised such amount instead of obtaining loan amount from suit cheque from the plaintiff. Evidently, his monthly salary is Rs. 15,000/- and he was not in position to satisfy the said amount and hence, he was required to allegedly raise amount by sell of car and borrowing money from father. But his brother-in-law is not examined as a witness to support, to show that car was sold to him. No doubt he has examined his father, who is DW 2, who has stated that he gave Rs. 60,000/- to the defendant and such amount was raised from coconut plantation. Further, the cross examination of the said witness is sufficient to show that he is not only unreliable for want of supporting evidence as to how the amount was raised, but is also clearly interested person and, therefore, his

word cannot be accepted as gospel truth to salvage the cause of the defendant. Once this position is reached, then fact remains on record that the suit amount for which the cheque was evidently issued by the plaintiff in favour of the defendant, was the amount which was never repaid to the plaintiff.

8. The perusal of the judgment of the trial Court clearly shows that it is observed by him that evidence was sufficient to show that Mahesh Kamat was very much connected with the suit transaction and inference can be that defendant had transaction with him, as Mahesh Kamat was surety to the loan. In my considered view, this is nothing but surmises on part of the learned trial Judge without any basis. It is also observed by the trial Court that plaintiff has not examined Mahesh Kamat on the ground that her relations with him are strained. Now, if the relations of Mahesh Kamat and plaintiff are strained, plaintiff is not expected to examine him as a witness. However, trial Court has observed that it is more likely that plaintiff is trying to help her son in order to harass the defendant. Entire evidence according to trial Court goes to show that there is more consistency in defendant's case and plaintiff's case is baseless. I prefer to disagree with this. It is not the case which is to be determined on preponderance of

probabilities. It is the case based on contract and once element of privity of contract between the parties is established, it was for the defendant to rebut the presumption raised in favour of the plaintiff, in which task he has totally failed. In view of this position, the trial Court Judge appears to be fallen in error in appreciating the entire evidential aspect involved in this matter and, therefore, I hold that the plaintiff deserves decree for suit amount.

9. The interest at the rate of 12% p.a. is a reasonable interest based on contract, as can be seen from the entire evidence on record and, therefore, decree in that regard also has to be passed.

10. In the result, the judgment and order passed by the Additional Civil Judge, Senior Division, Margao dismissing the plaintiff's suit is hereby set aside. The suit of the plaintiff is decreed with costs with directions that the defendants shall repay to the plaintiff an amount of Rs.1,12,557/- with interest at the rate of 12% p.a. from 22/02/1996 till 6/08/1997 and at the same rate from the date of the suit till actual realisation of the amount.

P.V. KAKADE, J.

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